were also sent. The shares were "to be pledged to your bank as security for my overdraft facilities." There was therefore security provided by the respondent as borrower for the overdraft facilities before the overdraft was granted and additional security was given after. It would not be unreasonable or unrealistic to assume that the overdraft was given to the respondent to enable him to take up and pay for the rights issue in I. & R.G., a company of which, it should be remembered, he was the managing director. In the decision for a rights issue to shareholders, he must have played a decisive part and it was necessary for him and the members of his family who were also shareholders to take up the shares issued by way of rights to them. These shares would have to be paid for and the money for them found. The money came from the bank and it was used for the respondent's own purpose.

The defence that was disclosed was, in the learned judge's own words that

"The first defendant also claimed that he had a good defence to the action in that he was only the nominee of Kang Kok Seng the managing director of the plaintiff company in all the loan agreements and that, if given leave to defend, he would be making Kang Kok Seng a third party.

According to the first defendant, in 1974 Kang Kok Seng suggested that Industrial & Realty Group Berhad should put up a rights issue to raise funds for further expansion and that he would be solely responsible for the finance involved as he was managing director of the plaintiff company and also other financial institutions. When the rights issue was agreed on, Kang Kok Seng arranged for Asian International Merchant Bankers Berhad to underwrite part of the rights issue and he himself agreed to underwrite a further portion. As Kang Kok Seng was the managing director of the Bank he requested the first defendant to execute all the necessary documents as he himself could not do so as he was also the Managing Director of Asian International Merchant Bankers and there might be a conflict of interests. When the rights issue was not fully taken up Kang Kok Seng had to take up what was underwritten by him. Kang Kok Seng then arranged for loans to be granted by the plaintiffs to the first defendant as his nominee for the purpose of taking up the shares. According to the first defendant it was in these circumstances that the loan document on which the plaintiffs sue came to be executed. The first defendant avers that he had not at any time personally approached the Plaintiff Bank for any assistance nor had he written to the plaintiff Bank to arrange for loans nor had he offered the second and third defendants as guarantors."

This was clearly a defence on the lines that this Kang Kok Seng had agreed to underwrite part of the rights to be issued. An underwriter has normally to take up the shares issued to but refused by the shareholders. It was suggested in this case that the respondent, as managing director of the I. & R.G. had to take up 1,500,000 shares which were not taken up by the shareholders to whom the rights were given and which would have to be taken up by the underwriter Kang Kok Seng or his nominee, the respondent. But in at least one aspect, this was patently untrue. The rights of at least 386,000 shares were taken up by the respondent's own sons and daughters and by one Madam Ong Yuk Looi, presumably his wife. And these shares were paid for by the overdraft. These shares did not therefore come within the obligation of the underwriter. On another aspect, the court was, significantly, not told and the reason for this silence had not been explained, how many shares the respondent himself had in this company, what his rights came to and whether the 1,114,000 shares that were issued in his name were not the rights given to him in respect of his own shareholdings. There was, as far as we can discern, no specific averment anywhere in all the affidavits filed by or on behalf of the respondent that these shares were the rights of other shareholders which because they were not taken up, had to be paid for by the underwriter. There was therefore nothing to tie up the issue of 1,500,000 shares to the respondent and his family with the underwriting.

But on the basis that there was this underwriting in the circumstances as alleged by the respondent, the defence to our mind and with respect, is no defence as against the appellants. If as he claimed he was a nominee of this Kang Kok Seng, but in the borrowing of money from the bank, he was contracting in his own name as principal, he was nevertheless liable personally. Thus in *Mootiah Chitty* v. *Palaniappa Chitty,*[1] a chitty who signed a deed with his own name even though it was preceded by the mark of the firm for which he acted, was held personally liable under the deed. In the case of a promissory note, see *Kavena Said Meydin* v. *Komarappa Chitty.*[2] See also the recent decision of the Federal Court in *Ching Yuen Tung* v. *Bep Aketik.*[3]

We think that at least the respondent himself doubted the validity of his defence. What he had and he knew he had, if he could prove the averments in the affidavits, was a cause of action against Kang Kok Seng and he had therefore sought to join Kang Kok Seng as the third party. He should be left to pursue his remedy, if any, subject to any advice he might receive, against Kang Kok Seng but it is clear that on the law, he had shown no possible defence against the claim of the appellants to recover the sum advanced.

We allow the appeal with costs here and in the court below. The judgment set aside will be restored.

Appeal allowed.

Solicitors: *Allen & Gledhill; Maxwell, Kenion, Cowdy & Jones.*

PUBLIC PROSECUTOR v. BUJANG BIN ALI & ORS.

[A.Cr.J. (Syed Othman J.) August 20, 1977]
[Johor Bahru — Criminal Appeal No. 7 of 1977]

Evidence — Chart published by the British Admiralty on authority of British Crown — Presumption of accuracy — Whether applies — Evidence Act, 1950, ss. 57 and 83.

Maps and Charts — Chart of waters of Malaysia made by British Admiralty — Whether prima facie accurate.

In this case the respondents had been charged with two offences in respect of rubber and scrap rubber which were found in their boat which was stated to be ¾ mile off Kampong Jawa, Penggarang, Johore. The question which arose in the case was whether a chart of the waters of Malaysia made by the British Admiralty is *prima facie* accurate. The learned president of the Sessions Court held that the respondents had no case to answer as the prosecution had failed to prove the accuracy of the British Admiralty Chart which was used to fix the position of the respondents' boat in the sea from Kampong Jawa, Penggarang. The Public Prosecutor appealed.

Held: (1) under section 83 of the Evidence Act the court can only presume the accuracy of maps and plans made by the authority of the Federal or any State Government. The presumption does not apply to maps and charts made by other Governments; their accuracy must be proved by the party producing it;

(2) in the present case the prosecution had not tried to prove the accuracy of the chart and failure to do so was fatal to the prosecution case.

CRIMINAL APPEAL.

Zulkifli bin Ahmad Makinuddin (Deputy Public Prosecutor) for the appellant.

Parjit Singh for the respondents.

Syed Othman J.: The respondents were charged in the Sessions Court at Johor Bahru with 2 offences under the Customs Act, 1967 in respect of 31,103 pounds of sheet rubber and 9,217 pounds of scrap rubber which were found in their boat, which is stated in the charge to be ¾ mile off Kampong Jawa, Penggarang, Johore: *first charge* under sections 135(1)(e) and punishable under section 135(1)(i) of the Act i.e. knowingly concerned in conveying in the boat the rubber with intent to defraud the Government of export duty of $7,300; *second charge* under section 49(1) and punishable under section 138 of the Act i.e. conveying the goods in local craft without the permission of the Director General of Customs.

They claimed trial. At the conclusion of the prosecution case the learned President Sessions Court acquitted the respondents.

There are several grounds of appeal. But Encik Zulkifli, Deputy Public Prosecutor, attached to the Customs Department, is merely asking one question to be determined as, according to him, it has far reaching implications. The question is whether a chart of the waters of Malaysia made by the British Admiralty is *prima facie* accurate.

The learned President, in his grounds of judgment, agreed with the submission of defence counsel, Encik Parjit Singh, that the respondents had no case to answer, as the prosecution had failed to prove the accuracy of the British Admiralty chart which had been used by the Customs officers to fix the position of the respondents' boat in the sea from Kampong Jawa, Penggarang, in the south coast of Johore.

On June 29, 1977 after hearing the arguments, I dismissed the appeal and indicated that I would give my grounds later.

For the appellant, it was argued that despite the provisions of section 83 of the Evidence Act, the court should have taken judicial notice of the accuracy of the British Admiralty chart by reason of section 57 of the Act, as the chart was made when the British were in authority in this country in 1933, and Customs and Marine officers had been using such chart for many years.

For the respondents, it was argued that it was not disputed that the chart was published under authority of the British Crown, but by reason of section 83 of the Evidence Act, its accuracy must still be proved.

Section 83 of the Evidence Act reads:

"The court shall presume that maps or plans purporting to be made by the authority of the Federal Government or the Government of any State were so made and are accurate."

Section 57 of the Act relates to matters of which the court shall take judicial notice. I do not think it is necessary for me to set it down here, as I find nowhere is it stated in the section that the court shall take judicial notice of the accuracy of maps or plans made under the authority of any of the Governments in this country or foreign Governments. The learned President rightly admitted the chart in evidence, as it was established that it had been used for fixing the position of the boat. But the question of the chart's accuracy is another matter.

Section 83 is clear. The court can only presume the accuracy of maps or plans made by the authority of the Federal or any State Government. The effect is that the presumption does not apply to maps or charts made by other Governments; their accuracy must therefore be proved by the party producing it.

In the present case, the prosecution should have no difficulty in proving the accuracy of the British Admiralty chart. The officer in charge of the Customs boat should have adduced evidence that he had always been using that chart and had found it to be accurate. Failure to do this, to my mind, was fatal to the prosecution case.

In any case, from the record I find that there are other grounds on which the learned President could have acquitted the respondents. I do not have to deal with them, as they have not been argued upon.

Before I leave, I would like to say that it is a well-known fact, as the prosecution itself has stated, that in maritime matters the Governments, Federal and State, mainly rely on maps or charts made by the British Admiralty and other maritime nations. I think the authority concerned should consider amending section 83, so that the presumption applies to any map or chart made by these maritime nations and used by Government departments.

Appeal dismissed.

Solicitors: *Parjit Singh & Co.*

ABDUL RAHMAN BIN CHE NGAH & ORS. v. PUTEH BIN SAMAT

[O.C.J. (Abdul Razak J.) February 10, 1977]
[Kota Bharu — Civil Suit No. 26 of 1973]

Tort — Negligence — Burning of rubbish heap ignited fire on adjacent land — Destruction of rubber trees — Principle of Rylands v. Fletcher applied.

The defendant was a contractor engaged to clear an irrigation canal which went through the plaintiff's rubber land. The work involved clearing bushes, weeds etc. in the stream and on the banks. It was alleged that these dumpings were negligently set on fire by the defendant and the ignition escaped to the defendant's land which caught fire, destroying the rubber trees on it.

Held: (1) there was clear evidence adduced by the plaintiff of negligence on the part of the defendant in not taking care, having started a fire, to control it as not to cause damage;

(2) even if negligence was not proved, the defendant was still liable under *Rylands* v. *Fletcher* for the escape of the fire resulting from an unnatural user of the land.

Cases referred to:-

(1) *Rylands* v. *Fletcher* (1866), L.R. 1 Exch. 265, aff. (1868), L.R. 3 H.L. 330.